IN THE

Supreme Court of the United States

OCTOBER TERM 1973

INDIANA & MICHIGAN ELECTRIC COMPANY,
Petitioner

v.

ANDERSON POWER AND LIGHT OF THE CITY OF ANDERSON, INDIANA;
RICHMOND POWER AND LIGHT OF THE CITY OF RICHMOND, INDIANA; AND
FEDERAL POWER COMMISSION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RICHMOND POWER AND LIGHT OF THE CITY OF RICHMOND, INDIANA, IN OPPOSITION

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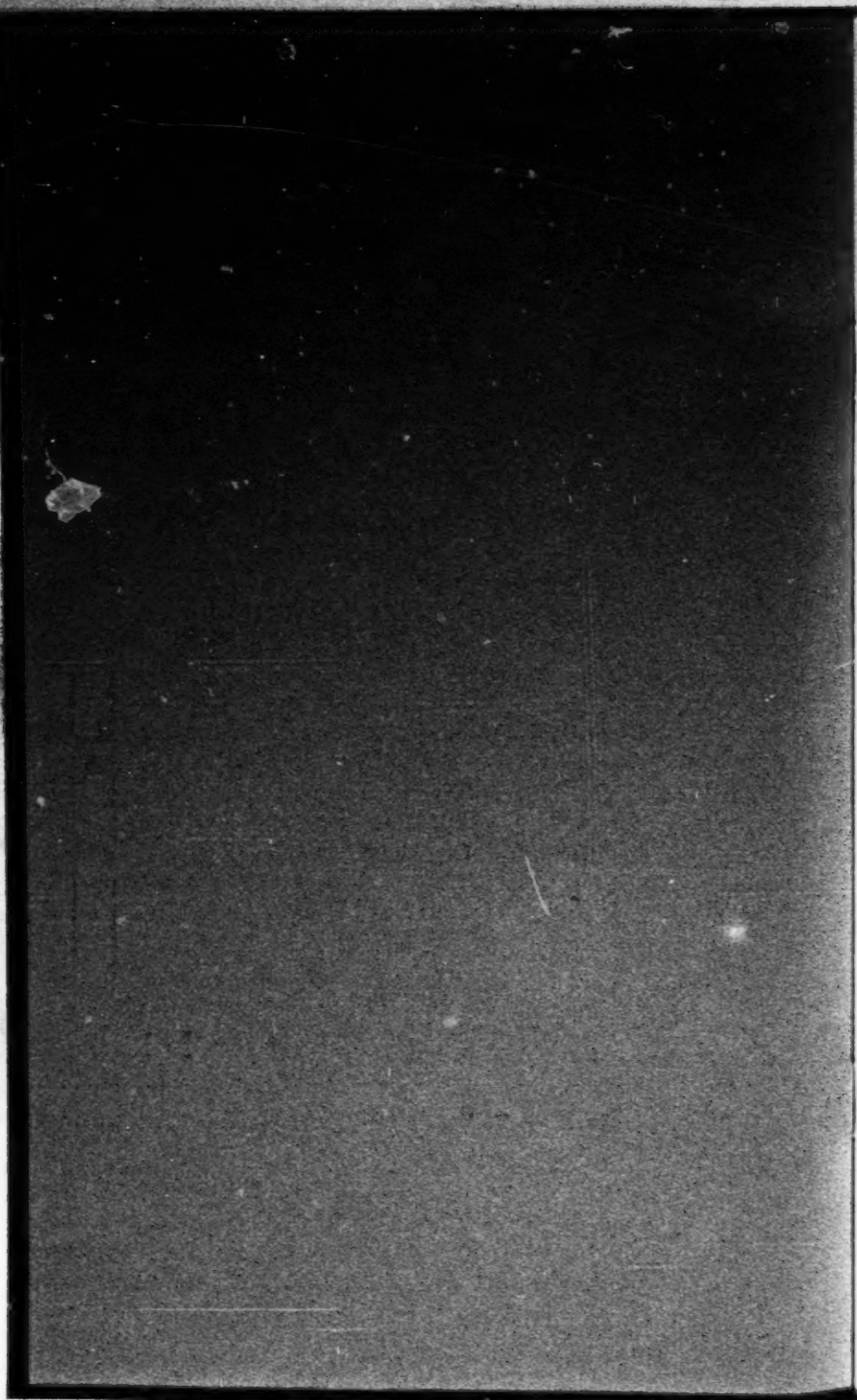

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OPINION BELOW

The opinion of the court of appeals is reported at 481 F.2d 490.

QUESTIONS PRESENTED

1. Whether the court of appeals correctly followed this Court's decisions in *United Gas Pipe Line Co.* v. *Mobile Gas*

Service Corp., 350 U.S. 332 (1956), *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956), and *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Division*, 358 U.S. 103 (1958).[1]

2. Whether the court of appeals was required to remand the proceedings to the Federal Power Commission for findings of fact when the sole factual issue before the court was the interpretation of a contract, an issue upon which the Commission had made findings of fact which the court of appeals determined to be in error.

STATEMENT

Respondent Richmond Power and Light of the City of Richmond, Indiana (Richmond) is a municipally-owned electric utility which supplies the City of Richmond, Indiana, its inhabitants, and adjacent communities with electric energy for public, commercial and industrial use. Richmond purchases electric energy for this purpose from petitioner Indiana & Michigan Electric Company (I&M) under a contract, filed with the Federal Power Commission (FPC), which establishes the rate for such service as I&M's "Tariff I.P. as regularly filed with the Public Service Commission of Indiana, . . . as long as said tariff is in effect." The Richmond-I&M contract was entered into on November 15, 1965, after I&M's wholesale for resale sales had been determined by the Federal Power Commission to be subject to FPC jurisdiction and after I&M had commenced filing its wholesale for resale rate schedules with the FPC.[2] The contract runs for a ten year period commencing January 1, 1966.

It was undisputed below that Tariff I.P., as regularly and currently filed with the Public Service Commission of Indiana, is an effective rate of I&M. Large industrial customers of I&M

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[1] These cases are referred to hereafter as *"Mobile"*, *"Sierra"*, and *"Memphis"*, respectively.

[2] In *Indiana & Michigan Electric Co.*, 35 FPC 298 (1966), the Commission noted that I&M commenced filing its wholesale for resale rate schedules with the Commission on July 1, 1965.

are served under Tariff I.P., as well as some wholesale customers which elected that rate, including Richmond.

Despite the continued existence of Tariff I.P., I&M sought to replace Tariff I.P. in its rate schedule for service to Richmond by a unilateral filing with the Federal Power Commission of a new Rate Schedule WS, substantially higher than Tariff I.P.[3]

Richmond protested the unilateral filing of Tariff WS and asked the Federal Power Commission to reject the filing as inconsistent with I&M's contractual undertaking to serve Richmond under Tariff I.P. as long as that Tariff is in existence. The Commission denied Richmond's request, holding that since the contract contemplated some change in rate it did not preclude the filing of Tariff WS to supersede Tariff I.P. for service to Richmond.

The court of appeals reversed the Commission. Applying the rule of *Mobile*, *Sierra* and *Memphis*, the court below held that under the Richmond-I&M contract the only changes that can be filed unilaterally with the FPC by I&M are those changes made in the Tariff I.P. as it is regularly filed with the Public Service Commission of Indiana. It thus directed the Commission to reject I&M's attempted unilateral filing of Rate Schedule WS to replace Tariff I.P. for service to Richmond.

ARGUMENT

The decision below, which is in accord with the decisions of this Court in the *Mobile*, *Sierra* and *Memphis* cases, *supra*, is clearly correct and does not warrant further review by this Court. There is no conflict among circuits alleged or extant.

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[3]The Tariff I.P. rate was increased approximately 10 per cent in March, 1972 by order of the Public Service Commission of Indiana. However, I&M did not at that time make a filing with the FPC to conform Richmond's rates to the new Tariff I.P. rates, as the Richmond-I&M contract clearly permits. The Rate Schedule WS rate filed unilaterally by I&M represents instead a rate increase to Richmond of approximately 45 percent.

I. All that is at issue in this case is a clear and simple matter of contract interpretation. The law as expressed by this Court is clear and straightforward and has been accurately stated by the court below as follows:

> "The rule of *Sierra, Mobile* and *Memphis* is refreshingly simple: The contract between the parties governs the legality of the filing. Rate filings consistent with contractual obligations are valid; rate filings inconsistent with contractual obligations are invalid." (footnote omitted). 481 F.2d at 493.

The *Sierra* and *Mobile* cases involved attempts to unilaterally change rates under fixed-rate contracts by making filings with the FPC pursuant to Section 205 of the Federal Power Act (or its equivalent, Section 4 of the Natural Gas Act). The Court held that the filing requirements of the Act do not operate to abrogate private contract rights and a rate change filing inconsistent with the contract is a nullity and must be rejected by the Commission. In *Memphis* the Court held that when a contract expressly provides for unilateral rate changes such changes can lawfully be made by a filing pursuant to Section 4 of the Natural Gas Act (equivalent to Section 205 of the Federal Power Act). The doctrine of these three cases thus operates to preserve the integrity of private contracts. As the court of appeals stated below: "These principles apply whether the parties agree to a specific rate or whether they agree to a rate changeable in a specific manner." 481 F.2d at 497.

The court of appeals examined the contract between Richmond and I&M and determined that under the express language of that contract Richmond is entitled to purchase electric energy from I&M during the term of the contract under the rate in I&M's Tariff I.P. as regularly filed with the Public Service Commission of Indiana, as long as Tariff I.P. remains in effect. It was undisputed below and remains undisputed here that Tariff I.P. is alive and well and operating as the basis upon which service is rendered to a group of I&M's industrial customers in Indiana. The court below thus properly held, applying the *Mobile, Sierra, Memphis* rule, that only changes in Tariff I.P. as filed with the Public Service Commission of

Indiana could be unilaterally filed by I&M with the Federal Power Commission as a change in rates for service to Richmond. The new Rate Schedule WS was not such a change and was properly ordered to be rejected.

2. I&M argues that its contract with Richmond is "nearly identical" in pertinent part to the contract under consideration in the *Memphis* case and that since the *Memphis* contract was held by this Court to permit unilateral rate filings by the supplier, the ruling below conflicts with this Court's holding in the *Memphis* case (Petition, p. 11). As the court below correctly recognized, the Richmond-I&M contract language is not analogous to the language of the *Memphis* contract. The agreements in *Memphis* provided for payment under a designated rate schedule *"or any effective superseding rate schedules* on file with the Federal Power Commission" (Emphasis in original). *Memphis, supra,* at 105. The Richmond-I&M contract provides for payment as follows:

> "The Customer hereby agrees to pay the Company monthly for electric energy delivered hereunder at the rate and under the provisions of Company's Tariff I.P. as regularly filed with the Public Service Commission of Indiana, said tariff being selected by the Customer, as long as *said* tariff is in effect; and in the event *said* tariff is replaced by a new or revised tariff incorporating higher or lower rates than those stipulated in the *aforementioned* tariff, the Company will continue to furnish service as stipulated in the Agreement and the Customer will pay for such service at the higher or lower rates from and after the date when such rates are made effective. Should the new or revised tariff incorporate higher rates, the Customer shall have the option of cancelling the Agreement prior to its expiration date provided notice of cancellation is furnished the Company within 15 days after the first billing date at the higher rates." (Emphasis added).

The Richmond-I&M contract, unlike the agreement in *Memphis,* does not provide for service under "*any* effective

superseding rate schedule" filed with the FPC by the company, but rather under the rates in one specific rate schedule, namely "Tariff I.P. as regularly filed with the Public Service Commission of Indiana", as said Tariff I.P. may be changed from time to time. The ruling of the court below is thus completely consistent with this Court's ruling in *Memphis*.

3. I&M argues that the court below has "confected" a new universally applicable, "parity theory" forbidding filing of wholesale rate increases which would disturb rate parity between wholesale sales and retail industrial sales of electricity. (Petition pp. 12-16). The court of appeals has done nothing of the sort.

The FPC argued to the court of appeals that the reference in the contract to the "Tariff I.P. as regularly filed with the Public Service Commission of Indiana" merely indicated that "at the time the agreements were made, the Public Service Commission of Indiana was regarded as the regulatory body with jurisdiction". 481 F.2d at 495. The court of appeals pointed out that this premise was factually incorrect and that the contract was entered into with full knowledge that the FPC, not the Indiana Commission, had jurisdiction over the service covered by the contract. 481 F.2d at 495-496.

The court of appeals went on to note the obvious reason why Richmond and I&M had agreed that the rate for this service would be governed by the Tariff I.P. as filed with the Public Service Commission of Indiana,[4] namely, that the contract therefore "ensures that Richmond, when it resells power to its industrial retail buyers, will be able to price itself competitively with the retail rates I&M offers to its own industrial customers"[5] 481 F.2d at 496. Thus, what I&M

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[4]As the contract expressly recognizes, the Tariff I.P. was a rate selected by Richmond for this service.

[5]Contrary to the statement on page 17 of the petition, Richmond did make this argument in its pleadings before the Federal Power Commission. (R. 40, 181-182). The reference "R." is to the pages of the Joint Appendix printed for use in the court below.

characterizes as a novel "parity theory" is no more than the answer of Richmond and the court of appeals to an untenable argument put forth by the Commission as to the reason for the reference in the contract to a tariff subject to the jurisdiction of the Public Service Commission of Indiana. It in no way alters the plain language of the contract or the interpretation of the contract which logically flows from that language.

4. I&M argues that the effect of the ruling below is to confer jurisdiction upon a state regulatory agency to determine rates for wholesale sales not subject to its jurisdiction. (Petition p. 13). This argument was made by the FPC in denying rehearing of its order accepting I&M's filing of the new Rate Schedule WS to replace Tariff I.P., and was fully answered by the court of appeals. In discussing this argument the court below said:

> "This response is most troubling, for it shows that the Commission simply does not understand, or more likely is not willing to abide by, the fundamental principle of the *Sierra-Mobile-Memphis* decisions. * * * Thus, in our own case, the Commission always remains free, upon its own motion, to enter into a proceeding under Section 206(a) of the Act to determine whether the contract rate between Richmond and I&M is 'unjust, unreasonable, unduly discriminatory or preferential * * *.' [footnote omitted] If it so determines, it can order the rate changed. If the Federal Power Commission believes that the Public Service Commission of Indiana is being niggardly in approving rate increases in Tariff IP, it is free to enter into a proceeding to require Richmond or any other wholesale buyer to pay a higher rate. In summary, the Richmond-I&M contract, like the contracts in *Mobile* and *Sierra*, does not limit the Commission's jurisdiction, for under the Act the Commission has no jurisdiction to change contract rates except after determining, through a proceeding under Section 206(a), that the contract rate is unreasonable." 481 F.2d at 497-498.

5. I&M contends that this case must be remanded to the Commission for findings of fact. The only "fact" in issue is the

contract itself, which was before the court of appeals. The FPC has no special expertise in contract law or contract interpretation, and the court of appeals was fully competent to examine the contract and determine that the FPC had misconstrued it.

The language of the Richmond-I&M contract is plain and unambiguous. Courts have uniformly held that where the language of a contract is clear and unambiguous the words will be given their plain and literal meaning without resort to any rules of interpretation or outside evidence of intention. *Climaco Calderon* v. *Atlas Steamship Co., Ltd.*, 170 U.S. 272 (1897); *Plymouth Mutual Life Insurance Co.* v. *Illinois Mid-Continent Life Insurance Co.*, 378 F.2d 389 (3rd Cir. 1967); *Standard Title Insurance Co.* v. *United Pacific Insurance Co.*, 364 F.2d 287 (8th Cir. 1966). It would thus be unnecessary and inappropriate to remand this case to the Federal Power Commission to adduce evidence as to the intent of the parties, as I&M suggests. The contract states on its face that:

> "There are no unwritten understandings or agreements relating to the service hereinabove provided."

The language describing the rates to be charged is clear and unambiguous: it establishes the rates as those contained in I&M's "Tariff I.P. as regularly filed with the Public Service Commission of Indiana", and there is an existing tariff meeting that description. No more is necessary.

CONCLUSION

For the forgoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

October 19, 1973

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